

Date Issued: March 14, 2024

File: CS-001991

Indexed as: Khan v. BC Ministry of Public Safety and Solicitor General, 2024 BCHRT 79

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,  
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before  
the British Columbia Human Rights Tribunal

BETWEEN:

Nathan Khan

**COMPLAINANT**

AND:

His Majesty the King in Right of the Province of British Columbia as represented by the Ministry  
of Public Safety and Solicitor General (Ford Mountain Correctional Centre)

**RESPONDENT**

---

**REASONS FOR DECISION**  
**APPLICATION TO DISMISS A COMPLAINT**  
Section 27(1)(b), (c), and (d)(ii)

---

Tribunal Member:

Robin Dean

Counsel for the Complainant:

Aleem Bharmal, KC

Counsel for the Respondent:

Joanne Kim

## I INTRODUCTION

[1] Nathan Khan, who is Muslim, describes himself as a Brown man of Fijian descent and East-Indian ethnicity. Mr. Khan alleges that the Ministry of Public Safety and Solicitor General discriminated against him in the area of services while he was incarcerated at the Ford Mountain Correctional Centre [FMCC] on the grounds of race, religion, and colour contrary to s. 8 of the *Human Rights Code*. He says that while at FMCC he was denied a Halal diet, subjected to discriminatory comments from others, including correctional centre staff, denied an article of religious faith, refused the ability to pray five times a day, and subjected to staff frisking his room for food during Ramadan.

[2] The Ministry says that it did not discriminate against Mr. Khan and applies to dismiss his complaint under ss. 27(1)(b), 27(1)(c), and 27(1)(d)(ii) of the *Code*.

[3] In this decision, the issues I must decide are:

- a. Under s. 27(1)(b), whether Mr. Khan's complaint alleges arguable contraventions of the *Code*;
- b. Under s. 27(1)(c), whether there is no reasonable prospect Mr. Khan will establish at a hearing that the Ministry discriminated against him based on race, religion, or colour when it took the various actions that Mr. Khan alleges; and
- c. Under s. 27(1)(d)(ii), whether proceeding against the Ministry would not further the purposes of the *Code* because the Ministry investigated Mr. Khan's complaints of racism and Islamophobia and found them to be unsubstantiated.

[4] For the following reasons, I deny the Ministry's application to dismiss. Mr. Khan's complaint will proceed.

## **II BACKGROUND**

[5] To make this decision, I have considered all the information filed by the parties. In these reasons, I refer only to what is necessary to explain my decision. I make no findings of fact.

[6] FMCC is a medium security correctional centre operated by the Ministry. The Ministry says FMCC provides people who are incarcerated there with a more communal living environment than other correctional facilities in the province. According to the Ministry, those living at FMCC are given keys to their living quarters and have greater autonomy over their activities and movements, although all must participate in a daily work program.

[7] In terms of religious life, the Ministry says it provides a variety of religious programs, practices, and diets to those who are incarcerated at FMCC. According to the Ministry, several diets are offered at FMCC, including no-pork, vegetarian, and Halal. Diet selections are typically made upon intake and noted by a correctional officer in a “client log”. Once a person living at FMCC has been approved for a particular diet, the Ministry says that the diet is provided “as soon as practicable”. Delay may be possible depending on the resources available at the applicable correctional centre.

### **A. Halal Diet**

[8] In September 2019, Mr. Khan was transferred to FMCC from the Surrey Pretrial Services Centre, where he had been approved for a Halal diet. There is a dispute between the parties as to whether Mr. Khan asked for a Halal diet from the beginning of his incarceration at FMCC. The Ministry says that Mr. Khan chose a no-pork diet. In the Ministry’s materials is a copy of Mr. Khan’s client log from September 30, 2019, which says that Mr. Khan “elected to go with no pork diet not Halal diet.” Mr. Khan disagrees with the Ministry’s version of events. According to Mr. Khan, correctional centre staff told him that a Halal diet was not available at FMCC and that he would have to go on a no-pork diet if he wanted to stay at FMCC and have access to its programs. Mr. Khan denies that he elected a non-Halal diet and asserts that the option to go on a Halal diet was never provided to him. He says he felt he had no other choice but to go on the no-pork diet.

[9] Mr. Khan says that in June 2020, his lawyer made written requests that Mr. Khan be placed on a Halal diet. Mr. Khan apparently also made the request himself verbally to correctional centre staff. On June 10, 2020, Mr. Khan was told by an Assistant Deputy Warden that he would start to receive Halal meals. There was an interim period, however, when Mr. Khan received vegetarian meals until Halal meals could be obtained.

### **B. Frisk of Cell for Food**

[10] Mr. Khan observed Ramadan in April and May 2020. Mr. Khan says that his cell was frisked on several occasions to look for illicit food during this time.

### **C. Prayer Schedule**

[11] The Ministry says that around June 2020 Mr. Khan's work duties changed in order to accommodate his prayer schedule.

### **D. Discriminatory Environment**

[12] Mr. Khan says that his incarceration at FMCC was characterized by a pervasive discriminatory environment. In particular, Mr. Khan's complaint alleges several instances of what he calls racism and Islamophobia at FMCC. Mr. Khan says he was subjected to racist and Islamophobic comments by both other people incarcerated at FMCC as well as correctional centre staff, including:

- a. On or about November 15, 2019, a comment by a correctional officer that "Oh well, he's a fucking immigrant, what do you expect?";
- b. On February 11, 2020, a comment by FMCC staff that Mr. Khan "probably put porn on the MP3s";
- c. On or about May 5, 2020, a comment by a correctional officer about Mr. Khan's observance of Ramadan, asking Mr. Khan while laughing, "How's your Rama-Dama-Dimmy going?"

- d. On May 12, 2020, jokes made by correctional centre staff about Ramadan;
- e. On or about May 18, 2020, a comment by another incarcerated individual, “I’m sick of these Muslims and their fasting bullshit.”;
- f. On or about May 23, 2020, a threat by the same individual, “I’m gonna smash you Muslims out.”;
- g. On June 12, 2020, a comment by kitchen staff on mistakenly providing Mr. Khan with a regular meal, that “you’ve been eating the same thing for the last eight months for fucksakes.”

[13] The Ministry characterizes some of these comments as “single comments” that don’t rise to the level of discrimination. The Ministry also says FMCC took the alleged comments made by kitchen staff and the other FMCC inmate seriously and promptly investigated them. However, the Ministry says FMCC found the comments unsubstantiated and took no further action except for offering to accompany Mr. Khan to the kitchen to receive his meals, which he apparently refused. Mr. Khan says that as a result of comments from kitchen staff, he stopped eating at the FMCC cafeteria and began to purchase all his food from the FMCC canteen.

### **E. Kufi**

[14] Mr. Khan says that while incarcerated at FMCC, he was denied a kufi, an Islamic head covering, which he wished to wear during his daily prayers. He said that he requested the kufi because he had been written up by correctional centre staff for praying with a towel over his head or with a head covering provided to him by a Sikh inmate.

[15] The Ministry says it denied Mr. Khan access to a kufi because it determined through its chaplains and the branch Imam that a kufi is “not a required religious object for Muslim faith practice.”

[16] Mr. Khan was released from custody in July 2020.

### III DECISION

#### A. Section 27(1)(b) – No arguable contravention

[17] Section 27(1)(b) of the *Code* gives the Tribunal the discretion to dismiss all or part of a complaint if it does not allege facts that could, if proven, contravene the *Code*. Under s. 27(1)(b), the Tribunal only considers the allegations in the complaint and information provided by the complainant. It does not consider alternative scenarios or explanations provided by the respondent: *Bailey v. BC (Attorney General) (No. 2)*, 2006 BCHRT 168 at para. 12; *Goddard v. Dixon*, 2012 BCSC 161 at para. 100; *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 49. The threshold for a complainant to allege a possible contravention of the *Code* is low: *Gichuru v. Vancouver Swing Society*, 2021 BCCA 103 at para. 56.

[18] In this case, Mr. Khan must set out facts that, if proved, could establish that he has a characteristic protected by the *Code*, he was adversely impacted in the services provided to him by the Ministry, and his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

##### 1. Discriminatory Comments

[19] The Ministry asserts that some of the comments that Mr. Khan complains about were “single comments” that should be dismissed because they do not allege an arguable contravention of the *Code*. In particular, it argues that the mispronunciation of Ramadan as well as the comment about the MP3s were isolated events that do not rise to the level of discrimination. Further, it says that Mr. Khan has not alleged that the MP3 comment was connected to a protected characteristics and that it should be dismissed for this reason as well.

[20] Negative comments or acts do not necessarily constitute discriminatory harassment unless those alleged acts, if true, are severe enough to contravene the *Code*, either in isolation or as a pattern of conduct: *Lobell v. Callaghan et al*, 2014 BCHRT 185. As noted by the Tribunal in *Brito v. Affordable Housing Societies*, 2017 BCHRT 270:

...not every negative comment that is connected to a protected characteristic will be discriminatory harassment contrary to the *Code*. It is certainly undesirable for people to treat each other rudely, disrespectfully, or inappropriately. However, it is not the Tribunal's purpose to adjudicate disputes other than where a person's protected characteristic has presented as a barrier in their ability to fully, and with dignity, access an area of life protected by the *Code*. In performing this function, the Tribunal is cognizant that the disputes brought to it arise between human beings, with all the imperfection it entails. Not every failure to be kind or professional requires state intervention. This includes failures with discriminatory overtones – and therefore highlights a distinction between comments that may be “discriminatory” in the everyday sense of that word, and comments that amount to discrimination, within the meaning and scope of human rights legislation. (para. 41)

[21] Usually, repeated conduct or a pattern of behaviour is required to establish harassment: *Hadzic v. Pizza Hut Canada (c.o.b. Pizza Hut)*, 1999 BCHRT 44 at para. 33. However, that is not always the case, and the Tribunal has recognized that sometimes a single slur or derogatory comment based on a protected characteristic may be sufficient to establish discrimination in certain circumstances. Whether discriminatory harassment is proven depends on many factors including the egregiousness of the behaviour, the context of the interactions, and the impact the behaviour had on the complainant: *Hadzic* at para. 34; *Pardo v. School District No. 43*, 2003 BCHRT 71 at para. 12; *Banwait v. Forsyth (No. 2)*, 2008 BCHRT 81 at para. 162.

[22] Here, I decline to consider the comments that Mr. Khan complains of in isolation. Mr. Khan says that he was subjected to many discriminatory comments while incarcerated. He therefore alleges a pattern of behaviour that he says created a discriminatory environment. If proved, the Tribunal could find that the repeated comments about Mr. Khan's religion and race did amount to discrimination.

[23] Further, regarding the MP3 comment, I do not parse out and dismiss this part of Mr. Khan's complaint. As the Tribunal said at para. 214 of *Fraser v. Tolko Industries Ltd.*, 2021 BCHRT 118, the Tribunal must be cautious when parsing out allegations that considered in context might amount to discrimination:

I decline to parse out, and dismiss, any of Mr. Fraser's particular allegations between January 29 and November 8, 2018. I consider the Court's recent comments in *Byelkova*. Mr. Fraser's many allegations of adverse treatment after his injury must be considered in context with each other. Some allegations on their own might not rise to the level of discrimination or might not appear connected to a ground of discrimination, but might do so when viewed contextually. This will be the case at a hearing as well as on this application.

[24] I am cautious of parsing out Mr. Khan's allegations as I see this as the type of situation that the Court in *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312, said could later prove embarrassing. This is particularly so, where, as here, Mr. Khan alleges that the volume of comments he was subjected to created a discriminatory environment. This comment must be considered in context with the other comments alleged as well as the other allegedly discriminatory conduct at issue. As in *Fraser*, some of the allegations on their own might not rise to the level of discrimination or might not appear to be connected to a ground of discrimination, but might when considered together, in context.

[25] I find that Mr. Khan has alleged facts regarding the discriminatory comments that, if proven could contravene the *Code*. I decline to dismiss this portion of the complaint under s. 27(1)(b).

## 2. *Frisk and Transfer Allegations*

[26] The Ministry also argues that Mr. Khan has made allegations concerning the frisks of his living quarters and a request to be transferred to another facility that are not connected to Mr. Khan's protected characteristics and therefore fail to allege contraventions of the *Code*. As I read the complaint, Mr. Khan is not alleging that the decision to deny his transfer request was discriminatory. For this reason, I do not consider the Ministry's argument about the transfer request any further.

[27] In terms of the frisk allegations, the Ministry asserts that the frisks were wholly unrelated to Mr. Khan's protected characteristics as they were operational and administrative decisions. The Ministry provides no additional information as to what it means by this. In any



event, looking only at the complaint, as I am required to do under s. 27(1)(b), Mr. Khan has alleged that his living quarters were singled out to be frisked **because** he was observing Ramadan, a pillar of his religious faith. If proven, the Tribunal could determine that this was a contravention of the *Code*. I decline to dismiss Mr. Khan's frisk allegations under s. 27(1)(b).

### **B. Section 27(1)(c) – No reasonable prospect of success**

[28] The Ministry applies to dismiss portions of Mr. Khan's complaint on the basis that those portions have no reasonable prospect of success: *Code*, s. 27(1)(c) The onus is on the Ministry to establish the basis for dismissal.

[29] Section 27(1)(c) is part of the Tribunal's gate-keeping function. It allows the Tribunal to remove complaints which do not warrant the time and expense of a hearing.

[30] The Tribunal does not make findings of fact under s. 27(1)(c). Instead, the Tribunal looks at the evidence to decide whether "there is no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence": *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 22, leave to appeal ref'd [2006] SCCA No. 171. The Tribunal must base its decision on the materials filed by the parties, and not on speculation about what evidence may be filed at the hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[31] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPQA v. Canadian Human Rights Commission*, [1989] 2 SCR 879 at 899. The threshold to advance a complaint to a hearing is low. In a dismissal application, a complainant does not have to prove their complaint or show the Tribunal all the evidence they may introduce at a hearing. They only have to show that the evidence takes their complaint out of the realm of conjecture: *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 [*Hill*] at para. 27.

[32] At a hearing, if Mr. Khan establishes the factors set out in *Moore*, the burden would shift to the Ministry to justify the impact as a *bona fide* reasonable justification.

[33] To justify any adverse impacts at a hearing, the Ministry would have to prove that: (1) it adopted the standard for a purpose rationally connected to the function being performed, (2) it adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose; and (3) the standard is reasonably necessary to the accomplishment of that legitimate purpose. This third element encompasses the Ministry's duty to accommodate Mr. Khan to the point of undue hardship: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*] at para. 20.

[34] If the impact is justified, there is no discrimination.

1. *Halal Diet*

[35] The Ministry asks me to dismiss this aspect of Mr. Khan's complaint, arguing that Mr. Khan will be unable to establish any adverse impact because the Ministry's records, supported by affidavit evidence, show that Mr. Khan did not ask for a Halal diet until June 2020, at which point it was promptly provided to him. However, Mr. Khan's affidavit says that he asked for a Halal diet upon intake and that he was made to feel by correctional staff that he had no other choice but to take a no-pork meal because a Halal diet would not be supported at FMCC.

[36] The Ministry says that any conflicts in the evidence should be resolved in its favour. Issues of credibility at the foundation of a case should not be decided based on conflicting affidavits alone. However, not all credibility issues are central to a case, and the fact that a complaint raises issues of credibility does not mean the Tribunal must deny an application under s. 27(1)(c). A Tribunal member may be able resolve credibility issues by other means. Usually corroborative evidence is required: *Monnette v. BC (Ministry of Justice)*, 2017 BCHRT 34 at para. 34.

[37] I must therefore consider whether the credibility issue presented here is central to Mr. Khan's case and whether corroborative evidence is available to resolve the credibility issue.

[38] In my view, the difference in the parties' evidence is central to the case as it speaks directly to the discrimination alleged to have occurred. Were a member hearing this case to decide that Mr. Khan indeed asked for a Halal diet upon intake and that request was denied or discouraged, that could support a finding of discrimination. The Ministry argues that the client log corroborates the evidence provided by the correctional staff who oversaw Mr. Khan's intake. However, the client log simply states that Mr. Khan elected to go with a no-pork diet rather than a Halal diet, which is something that Mr. Khan does not dispute. The client log fails to speak to the context around Mr. Khan's choice – i.e. that he says he felt he had no other option but to go with a no-pork diet. This is a key conflict in the evidence. A hearing on this issue is required to resolve the central credibility issues raised by the affidavit evidence.

## *2. Daily Prayers*

[39] The Ministry says that Mr. Khan cannot show that he was adversely impacted with regards to his daily prayers because the evidence contradicts his allegation that he was denied the right to pray.

[40] In his complaint, Mr. Khan says that he was denied the right to pray five times a day because FMCC required him to work during his prayer times. The Ministry says this was not the case. Particularly, the Ministry points to emails from April 2020 until the time Mr. Khan was released, which indicate it gave FMCC staff Mr. Khan's prayer schedule and notified staff that Mr. Khan would be allowed to go to his room to pray during these times. The Ministry also points to its efforts in June 2020 to change Mr. Khan's job duties to accommodate his prayer times.

[41] There is no evidence supporting the Ministry's position about what occurred from the time of intake in September 2019 through March 2020, a period of six months. Mr. Khan says that he was not able to make his daily prayers. The Ministry's materials do not mention accommodating Mr. Khan's prayer schedule until June 2020, when he was assigned the position of hut cleaner because his work schedule was interfering with his obligatory prayer times. If Mr.

Khan's evidence is accepted at a hearing of this matter, it could lead to a finding of adverse impact. I decline to dismiss the prayer allegation under s. 27(1)(c).

### 3. *Discriminatory Comments*

[42] The Ministry argues that Mr. Khan cannot show an adverse impact with regards to the comments made by FMCC staff and contractors because the allegations were promptly investigated and determined not to have occurred. Mr. Khan, however, says in his affidavit that they did occur. I do not have corroborative evidence such as statements from others who were there at the time the comments were allegedly made. Because of this lack of corroborative evidence, I am unable to resolve these issues on the materials before me.

[43] As stated above, if there are foundational or key issues of credibility, the complaint must go to a hearing: *Francescutti* at para. 67. This dispute on the evidence goes to the heart of the allegations in Mr. Khan's complaint. I cannot say based on the material before me that Mr. Khan's complaint about the discriminatory comments he alleges have no reasonable prospect of success. A hearing is needed on this key factual issue to resolve the conflicting evidence between the parties.

### 4. *Denial of Kufi*

[44] The Ministry argues that the kufi complaint has no reasonable prospect of success because the Ministry is reasonably certain to prove a defence at the hearing: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50. In particular, the Ministry says that there was a *bona fide* and reasonable justification for denying Mr. Khan's request for a kufi. The Ministry says that allowing Mr. Khan to wear a kufi raised safety and security concerns. It further says it verified through the Imam affiliated with FMCC that a kufi is not a required for Muslim practice.

[45] The evidence is scant, however, on how wearing a kufi presented safety and security issues. In light of the lack of evidence on why the kufi was a safety and security concern, I am unable to find the Ministry is reasonably certain to prove a *bona fide* reasonable justification because the Ministry will not be able to show that denying Mr. Khan access to the kufi was reasonably necessary to maintain safety and security at FMCC. There is no indication in the

material before me that FMCC could not meet its safety and security goals while accommodating Mr. Khan without incurring undue hardship.

### **C. Section 27(1)(d)(ii) – Proceeding would not further the purposes of the Code**

[46] Section 27(1)(d)(ii) allows the Tribunal to dismiss a complaint where proceeding with it would not further the purposes of the *Code*. These purposes include both private and public interests: s. 3. Deciding whether a complaint furthers those purposes is not only about the interests in the individual complaint. It may also be about broad public policy issues, like the efficiency and responsiveness of the human rights system, and the expense and time involved in a hearing: *Dar Santos v. UBC*, 2003 BCHRT 73, at para. 59, *Tillis v. Pacific Western Brewing and Komatsu*, 2005 BCHRT 433 at para. 15, *Gichuru v. Pallai (No. 2)*, 2010 BCHRT 125, at paras. 113-118.

[47] The Ministry argues that it would not further the *Code's* purposes for the complaint about the discriminatory comments to proceed because the underlying dispute has been resolved or remedied: *Williamson v. Mount Seymour Park Housing Coop*, 2005 BCHRT 334. Particularly, the Ministry argues that FMCC took Mr. Khan's complaints about the alleged discriminatory comments seriously, investigated them, and ultimately determined that the events alleged by Mr. Khan did not occur.

[48] Generally, where a complaint of discrimination has been appropriately resolved, proceeding with the complaint would not further the purposes of the *Code* because the discrimination has already been remedied: *Williamson* at para. 13. The Tribunal's ability to fulfill the purposes of the *Code* is harmed when its resources are taken up with complaints that have already been adequately addressed, whether through settlement, unilateral respondent action or other proceedings: *Williamson* at para. 13.

[49] For the Tribunal to dismiss a complaint under s. 27(1)(d)(ii) on the basis that the respondent has appropriately addressed the alleged discrimination, the respondent must persuade the Tribunal that:

- a. The respondent took the complainant's discrimination claim seriously;
- b. The respondent appropriately addressed the impact on the complainant; and
- c. Where necessary, the respondent took appropriate steps to ensure the discrimination would not happen again: see, e.g., *Horner v. Concord Security Corp*, 2003 BCHRT 86; *Williamson*; *Aflakian v. Fraser Health Authority*, 2011 BCHRT 170; *Baker v. Brentwood College School and another*, 2011 BCHRT 170; Stengert.

[50] The Tribunal's analysis under s. 27(1)(d)(ii) is contextual and case specific. Alongside the above requirements for dismissing a complaint on the basis that the alleged discrimination has been addressed, the Tribunal may also consider relevant contextual factors, such as: the seriousness of the alleged discrimination; the timeliness of the respondent's response to the allegation; the nature of its response (e.g., whether the respondent investigated the allegation); whether the respondent acknowledged the discrimination; whether the complainant was compensated for their losses; whether the respondent has a discrimination policy; and the importance of encouraging parties to address allegations of discrimination in a timely and constructive manner: see *Baker* at para. 47.

[51] Here, while I commend FMCC on taking Mr. Khan's complaints about the alleged discriminatory comments seriously and investigating them promptly, I do not exercise my discretion to dismiss Mr. Khan's complaint under s. 27(1)(d)(ii). The Ministry's arguments hinge on the allegation that the comments did not occur. I have set out above why I am not persuaded that the complaint should be dismissed on the basis of that argument. A hearing is required to determine whether the evidence shows that there was a pattern of discriminatory comments experienced by Mr. Khan.

[52] Further, the outcome of any investigation by a respondent is not dispositive of an application to dismiss under s. 27(1)(d)(ii). Whether these comments occurred is disputed by the parties, and this issue remains outstanding. There has therefore been no acknowledgement that discrimination occurred, and no compensation or other remedy provided to Mr. Khan. If

Mr. Khan establishes that the discrimination occurred, then the *Code's* purpose of providing a means of redress for people who have experienced discrimination will be fulfilled.

#### **IV CONCLUSION**

[53] I deny the Ministry's application to dismiss. Mr. Khan's complaint will proceed.

Robin Dean  
Tribunal Member